IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.174 OF 2002 .

Shri Ramnarayan B. Gupta : Appellant.

versus

Shri Phulchand Dasuram & ors. : Respondents.

Mr.R.D.Soni i/by D.F.Sharma for the appellant.
Ms.Leena Sawant for respondent Nos. 3 and 4.
Mr.G.S.Godbole with Mr.G.H.Keluskar for respondent No.1.

CORAM : D.G.DESHPANDE,J.

DATED : 24th February 2005.

ORAL ORDER

1. This matter was heard by me earlier partly and it was kept for final hearing today. Today heard the advocates for the respective parties.

2. This appeal is filed by the original

plaintiff against the order of dismissal of his suit by the City Civil Court Bombay by its order dated 7.1.2002. The suit of the plaintiff was based on a written agreement between the parties. It was Exhibit H. It is dated 18.7.1967. All the parties to the suit are the parties to the said agreement. According to the plaintiff it is an agreement evidencing family arrangement as between the parties who are the brothers or closely related persons to each other. It is in respect of Shop No.1 on the ground floor of House No.36, at Kamathipura 13th Lane, Bohri Chawl; then in respect of Shop No.12 in the chawl near Lachhmibai chawl, at Dharavi Kumbharwada Road, Dharavi; and in respect of Room No.10 on the ground floor of Property No.34 at Kamathipura and Room No.13 on the first floor of the said property No.34, Kamathipura. It is in respect of two shops and two rooms. It was agreed between the parties under this agreement that each of the party will run the business of Chana Kurmura in the respective terms as mentioned in clauses 4, 5 and 6 for a period of six months commencing from the date in 1967 and this will go on in rotation. It is the case of the plaintiff that when the turn of original defendant NO.1 came he refused

to hand over possession in rotation to the person who was entitled to and, therefore, the suit came to be filed for declaration that there was valid and subsisting arrangement between the plaintiff on one hand and, the other defendants for carrying on business and, the arrangement was binding upon the parties. Consequently prayer for to hand over possession in rotation was also made in the suit.

3. This suit of the plaintiff was resisted by the defendants firstly on the ground that this is a partnership business and, the suit is in respect of business of partnership. Therefore, in the absence of registration of the partnership, the suit was not maintainable. Secondly, it was contended that, the contention of the plaintiff, that the business was of joint family business, was contrary to the facts on record and; thirdly, specific right in respect of Room No.10 was claimed by the defendants i.e. it was their self acquired property.

4. The trial Court has framed as well as nine Issues and, up held the contentions of the defendants that it was the partnership deed to

run the business and, therefore, the suit came to be dismissed for want of registration in view of the findings on Issue No.4. It is against this judgment and order, the present appeal has been filed.

5. I heard both the advocates at length. They took me through the relevant documents and evidence.

. The crucial question in this case is of interpretation of the agreement between the parties (Exhibit H). The trial Court has given a finding on the basis the said agreement (Exhibit H) and has inferred that it was a partnership. But it is clear from the record that the trial Court has lost sight of the important fact that this agreement came to be executed between the parties on 18.7.1967 and the suit of the plaintiff came to be filed in 1994 i.e. after a period of about 27 years. The defendants, who are now resisting the claim of the plaintiff, took advantage of this agreement (Exhibit H) through out a period of 27 years, they never took any steps to get the partnership registered, if it was a partnership in fact. They did not

assert any right in respect of the property as partners because from clauses 4, 5 and 6 of the agreement it is clear that the person, who becomes entitled to run the shop for a period of six months, was to appropriate all profits during that period, was to be liable to the loss if any, during that period and, this facility or right was given to each of the partner. It will be clear from the aforesaid terms in clauses 4, 5 and 6 that there was no agreement between the parties to share the profit and loss amongst each other and each party was entitled to appropriate the profit or to bear the loss entirely and exclusively.

6. The crux of the partnership is the agreement regarding sharing of profit and loss. There is no such agreement between the parties and; secondly, for 27 long years the defendants acted upon this document and reaped benefit thereof. When his turn came up to hand over the possession, he refused and, when this suit was filed started raising different objection as noted by me earlier. This is nothing but devises invited by the defendants to deny legitimate and legal as well as contractual claim of the

plaintiff. the trial Court did not consider this important aspect of the matter, but merely relied upon use of the word Partner and Partnership business in the said document (Exhibit H) and, ultimately came to a wrong conclusion resulting in dismissal the suit.

7. The second objection of the contesting respondent was that this was not a joint family business. But this contention is also without basis or force. because in this agreement itself ie. in Exhibit H it is repeatedly asserted that the parties have been carrying on business as the members of the Joint Hindu Family. The agreement mentions that this was being done by them since last few years i.e. few years before 1967. It would mean that 35 years or more than 30 years at least the parties have accepted the position that it was joint family property and joint family business. Now after the period 30 years from the said agreement the defendants cannot be permitted to contend that it is not the business of joint family or it is not the property of joint family. Therefore, the defence that it is self acquired property is absolutely bogus and should have been rejected by the trial Court out right.

8. It is clear from the judgment that the trial Court did not seriously and thoroughly consider the document (Exhibit H) which was the basis for the claim of the plaintiff. The trial Court did not try to ascertain the intention of the parties as revealed by the document. The trial Court also did not compare this document with the provisions of the Partnership Act. Mere use of the word "Partner", "Partnership", or "Partnership Business" in this document by the parties will not create status of partnership in the absence of the contract to that effect about sharing of profit and loss; about making contribution to the capital. Therefore, the judgment of the trial Court is perverse. The trial Court fell into the trap of defendant who has raised a plea just to resist the legitimate contractual claim of the plaintiff to run the business in rotation. In view of these facts, this appeal is required to be allowed. Hence the following order :-

:ORDER:

The appeal is allowed.

The order of dismissal of the plaintiff's suit is set aside. The suit of the plaintiff is decreed as prayed for.

The Court Receiver will now place the plaintiff in possession of the property and for rotation of the business, the agreement will be the basis for everybody.

The defendants will pay the costs of the plaintiff in the trial Court as well as costs of this appeal.

Prayer for stay by the original defendant No.1 is rejected. Because his case and defence is found to be totally false and bogus.

Certified copy expedited.

[D.G.DESHPANDE]

24/02/2005 JUDGE.